SUPREME COURT, U. S.
AUG 3 1970
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 488

C. R. PITCHFORD and JEAN PITCHFORD,
Petitioners,

vs.

PETER KUZEMCHAK and LOIS KUZEMCHAK,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

JOHN E. MENIG, Esq.
Counsel for Petitioners
5200 Copper, N. E.
Albuquerque, N. M.

Of Counsel:

STANLEY C. SAGER, Esq.
EDWARD T. CURRAN, Esq.
5200 Copper, N. E.
Albuquerque, N. M.

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

INDEX

Opinions Below 1
Jurisdiction 2
Question Presented 2
Statute Involved 3
Statement of the Case 3
Reasons for Granting the Writ (Argument) 6
1. The New Mexico Court Has Decided a Federal Question of Substance Which Has Been Decided in Conflicting Ways in Other State Courts of Final Jurisdiction, and in Other Federal Courts, and Which Has Not Heretofore Been Determined by This Court 6
Conclusion 10
Appendix A1
Judgment Sought to be Reviewed ..... N.M. 468 P2d 409 (1970) A1
Opinion A2
Order Denying Motion for Rehearing A9
28 U.S.C. 1257 (3) A10
Defendants' Requested Findings of Fact and Conclusions of Law A10
Bernalillo County District Court Order A12
U. S. Const. amend. XIV, Sec. 1 ..... A13

Citations

CASES:

Allen v. *Lindeman*, 164 N.W.2d 346 (Iowa 1969) 6
Armstrong v. *Monzo*, 380 U.S. 545 (1965) 9
Consolidated Plan of Connecticut v. *Bonitatibus*, 130 Conn. 199, 33 A.2d 140 (1943) 6
Continental Illinois Nat. Bank and Trust Co. v. *Rock Island Ry.*, 294 U.S. 648 (1935) 9
Dutkiewicz, In re, 27 F.2d 334 (W.D.N.Y. 1928) 7

Fidelity & C. Co. v. Golombosky, 133 Conn. 317, 50 A.2d 817, 170 ALR 361 (1946) 7
Fuller, In re, (M.D. Pa. 1937) 18 F. Supp. 394 6
Greenfield v. *Tuccillo*, 129 F.2d 854 (2nd Cir. 1942) 7
Harrison v. *Donnelly*, 153 F.2d 588 (8th Cir. 1946) 6
Kubiniec, In re, 2 F. Supp. 632 (W.D.N.Y. 1932) 7
Kuzemchak v. *Pitchford*, 78 N.M. 378, 431 P.2d 756 (1967) 3
Kuzemchak v. *Pitchford*, ... N.M. ....., 468 P.2d 409 (1970) 1, 5
Levin v. *Singer*, 227 Md. 47, 175 A.2d 423 (1961) 7
Local Loan Co. v. *Hunter*, 292 U.S. 234, 245 (1934) 9
Miller v. *Rush*, 155 Colo. 178, ... P.2d 565 (1964) 6
National Finance Co. of Provo v. *Daley*, 14 Utah 263, 382 P.2d 405 (1963) 6
Peerson v. *Mitchell*, 205 Okl. 530, 239 P.2d 1028, 26 ALR 1362 (1950), cert. denied 342 U.S. 866, 72 S. Ct. 106, 96 L.ed. 652 (1951) 6
U. S. v. *Oregon*, 366 U.S. 643 (1961) 7
United States Credit Bureau v. *Manning*, 147 Cal. App. 2d 558, 305 P.2d 970 (1957) 7
Wegiel v. *Hogan*, 28 N.J. Super. 144, 100 A.2d 349 (1953) 6
Welch v. *Old Dominion Bank*, (D.C.C.A. 1967) 229 A.2d 455 7
Williams v. *U. S. Fidelity Co.*, 236 U.S. 549, 554, 555 (1915) 9

U. S. CONSTITUTION AND STATUTES:

U. S. Const., Art. I, Sec. 8, Cl. 4 6
U. S. Const., Amend. XIV, Sec. 1 9
11 U.S.C. 35 (a) (2) 3, 4, 5, 6, 10
28 U.S.C. 1257 (3) 2

MISCELLANEOUS AUTHORITIES:

1 Collier on Bankruptcy, 14th ed., Sec. 17.16[4] 6
1 Collier, Bankruptcy Manual, Sec. 17.00 (2nd ed. 1969) 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No.

C. R. PITCHFORD and JEAN PITCHFORD,
Petitioners,

vs.

PETER KUZEMCHAK and LOIS KUZEMCHAK,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

Mr. John E. Menig, on behalf of the Petitioners, prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Mexico entered in the above case on May 15, 1970.

OPINIONS BELOW

The opinion of the District Court of Bernalillo County, State of New Mexico, is unreported. The opinion of the Supreme Court of the State of New Mexico is officially reported in ..... N.M. ....., 468 P.2d 409 (1970) and unoffi-

cially reported in State Bar of New Mexico Bulletin and Advance Opinions, Vol. 8, No. 45. It appears in the Appendix, p. A1. The order of the Supreme Court of New Mexico denying the Petitioners' motion for rehearing is unreported. It appears in the Appendix, p. A9.

JURISDICTION

The opinion of the New Mexico Supreme Court was dated March 23, 1970, and that is the time of its entry.

An order denying Petitioners' motion for rehearing was dated and filed May 4, 1970.

The statutory provision believed to confer jurisdiction to review the judgment or decree in question by writ of certiorari is 28 U.S.C. 1257 (3) (Appendix, p. A10).

QUESTION PRESENTED

The question presented for review by this Petition is as follows:

Whether a state court, when asked to determine that its prior judgment is not dischargeable in bankruptcy because it allegedly was based upon a liability for obtaining money or property by false pretenses or false representations under 11 U.S.C. 35 (a)(2), may go behind that judgment, and examine the transcript of the testimony at the original trial when the record proper shows that at no time was the defendant-bankrupt given notice that a charge of false pretenses or false representations was any part of the claim against which he was then defending.

STATUTE INVOLVED

The pertinent portion of the Federal Bankruptcy Act, 11 U.S.C. 35 (a) (2), is:

> (a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as . . . (2) are liabilities for obtaining money or property by false pretense or false representations, . . .

STATEMENT OF THE CASE

This Statement of the Case is substantially as set forth in the opinion (Appendix, p. A1).

In 1964 the respondents (Kuzemchaks) filed a complaint against the petitioners (Pitchfords) in the District Court of Bernalillo County, New Mexico. They alleged that in a written agreement to purchase their home the Pitchfords had assumed and agreed to pay the outstanding mortgage thereon. They further alleged that the Pitchfords' failure to pay the mortgage as agreed had resulted in a foreclosure and deficiency judgment, which the Kuzemchaks had been required to pay. It was for this payment that they sought judgment against the Pitchfords.

The trial court dismissed the complaint on the theory that the deed given to the Pitchfords, which conveyed the home, recited only that it was subject to the mortgage, and that the acceptance of the deed superseded the agreement and eliminated the obligation in it. On appeal, the New Mexico Supreme Court reversed. *Kuzemchak* v. *Pitchford*, 78 N.M. 378, 431 P.2d 756 (1967). The trial court, on the New Mexico Supreme Court mandate, entered judgment for the Kuzemchaks and against the Pitchfords.

The result was a judgment for breach of contract based upon a complaint that alleged solely the breach of the agreement to pay the mortgage. The New Mexico Supreme Court decision (supra) was framed solely upon the theory of the breach of contract.

On October 16, 1968, a writ of garnishment was issued upon this judgment. On October 21, 1968, the Pitchfords filed a petition in bankruptcy, and thereupon asked the trial court to quash the writ of garnishment claiming they were entitled to a stay of proceedings because of the bankruptcy. The request was granted by ex parte order. At the hearing upon a motion to vacate this order, over Pitchfords' objections, the trial court considered portions of the transcript of the testimony taken at the original trial and as a result concluded that the judgment was not dischargeable in bankruptcy under 11 U.S.C. 35 (a)(2). The trial court found that the transcript of testimony indicated it was based on an indebtedness which was incurred as a result of false pretenses and false representations fraudulently made. It was at this hearing that the Pitchfords raised the federal question of the applicability of 11 U.S.C. 35 (a)(2), and their position is preserved by requested findings of fact and conclusions of law (Appendix, p. A10). The trial court overruled the objections made to the review of the transcript of the trial testimony upon the inquiry into dischargeability, and considered the transcript. The trial court's order appears in the Appendix, p. A12.

In its review of the trial testimony from the transcript, the court found that the Pitchfords were realtors and purchased the home for immediate resale. It found that in order to induce the Kuzemchaks to sell the home to them, the Pitchfords had falsely and fraudulently represented

that they wanted the house for their personal use and occupancy.

The Pitchfords' position was that since at the time of the trial no issue had been raised as to the existence of false pretenses or false representations (Appendix, p. A10), they had not defended against the testimony or against that theory of liability. The court set aside the stay of garnishment.

The Pitchfords appealed the trial court's decision setting setting aside the stay of garnishment, to the New Mexico Supreme Court. The New Mexico Supreme Court affirmed the trial court's order in an opinion reported in *Kuzemchak* v. *Pitchford*, N.M. , 468 P.2d 409 (1970). (See Appendix, p. A1). The Pitchfords moved the New Mexico Supreme Court for a rehearing, and this motion was denied by order filed May 4, 1970. (See Appendix, p. A9).

In its opinion, the New Mexico Supreme Court recognized three conclusions which have been reached in various state courts of final jurisdiction, and in lower federal courts, which have considered the question of how far, if at all, a court may go behind its judgment in determining dischargeability or nondischargeability under 11 U.S.C. 35 (a)(2). The court attempted to balance the basic reasons for these different rules against foreseeable applications of the same, and concluded that the purposes of the Bankruptcy Act are better served by permitting the trial court to review the entire record, including the transcript of the testimony, than by limiting it to the form of judgment and the record proper.

REASONS FOR GRANTING THE WRIT

1. The New Mexico Court has decided a federal question of substance which has been decided in conflicting ways in other state courts of final jurisdiction, and in other federal courts, and which has not heretofore been determined by this Court.

The question (p. 2 of this Petition) relates specifically to the means of determining dischargeability and nondischargeability as found in Section 35 (a)(2) of the Federal Bankruptcy Act. (11 U.S.C. 35 [a][2]).

The Constitution gives Congress the power:

> "to establish a uniform Rule of Naturalization and uniform Laws on the subject of bankruptcies throughout the United States." Art. I, Sec. 8, Cl. 4.

The court below admits that there is no uniformity in this area. The authorities are divided and three conclusions have been reached (Appendix, p. A4):

a. "That the judgment is conclusive and the court will not go behind the record proper to determine the facts." *Consolidated Plan of Connecticut* v. *Bonitatibus*, 130 Conn. 199, 33 A.2d 140 (1943); *National Finance Co. of Provo* v. *Daley*, 14 Utah 263, 382 P.2d 405 (1963); *Peerson* v. *Mitchell*, 205 Okl. 530, 239 P.2d 1028, 26 ALR 1362 (1950), cert. denied 342 U.S. 866, 72 S.Ct. 106, 96 L.ed. 652 (1951); *In re Fuller* (M.D. Pa. 1937) 18 F. Supp. 394; *Harrison* v. *Donnelly*, 153 F.2d 588 (8th Cir. 1946); *Miller* v. *Rush*, 155 Colo. 178, ...P.2d 565 (1964); 1 Collier on Bankruptcy, 14th Ed., Sec. 17.16 [4].

b. "That a review of the whole record including testimony is permitted to determine the nature of the claim." *Allen* v. *Lindeman*, 164 N.W.2d 346 (Iowa 1969); *Wegiel* v. *Hogan*, 28 N.J. Super. 144, 100 A.2d

349 (1953); *In re Dutkiewicz*, 27 F.2d 334 (W.D.N.Y. 1928); *In re Kubiniec*, 2 F. Supp. 632 (W.D.N.Y. 1932); 1 Collier, Bankruptcy Manual, Section 17.00 (2nd ed. 1969).

c. "That review of the entire record and transcript of the original proceedings together with any extrinsic evidence is permitted." *Fidelity & C. Co.* v. *Golombosky*, 133 Conn. 317, 50 A.2d 817, 170 ALR 361 (1946); *United States Credit Bureau* v. *Manning*, 147 Cal. App. 2d 558, 305 P.2d 970 (1957); *Levin* v. *Singer*, 227 Md. 47, 175 A.2d 423 (1961); *Greenfield* v. *Tuccillo*, 129 F.2d 854 (2nd Cir. 1942); *Welch* v. *Old Dominion Bank*, (D.C.C.A. 1967) 229 A.2d 455.

Justice Watson, author of the New Mexico opinion admits that point "c" above is authorized only by a minority of courts.

As the opinion stands, the New Mexico court, in belief that both justice and the bankruptcy act are better served by permitting the trial court to review the entire record and transcript of testimony, found that conclusion "b" above was the view most acceptable to New Mexico.

Of the three interpretations presented by the courts, this court has not pointed to the correct one. The opinion of the New Mexico court simply contributes to the existing conflict in the decisions.

The effect of having three different approaches to inquiry into the dischargeability of a judgment debt in bankruptcy results in a varying treatment of bankrupts from one state jurisdiction to another. A conflict among decisions made by state courts of final jurisdiction has been held grounds for granting a writ of certiorari when an important question of federal statutory construction is involved. *U. S.* v. *Oregon*, 366 U.S. 643 (1961).

In those jurisdictions applying view "a", "That the judgment is conclusive, and the court will not go behind the record proper to determine the facts", the bankrupt is secure in the knowledge that the relationship between the judgment creditor and himself is fixed when the judgment is entered.

In those jurisdictions applying view "b", "That a review of the whole record including testimony is permitted to determine the nature of the claim", the bankrupt cannot know for certain what his relationship is with his judgment creditors, although by its terms the judgment was not based on false representations or false pretenses. At any time after bankruptcy, the bankrupt may be required to defend these charges. His defense then is based upon a record of testimony taken at a time when fraud was not an issue, and when he therefore was not defending against it. His prosecutor is examining the transcript of testimony in the context of charges of false representations and false pretenses, when the context out of which the testimony arose was something other than that.

In those jurisdictions applying view "c", "That review of the entire record and transcript of the original proceedings together with any extrinsic evidence is permitted", the bankrupt is exposed to the possibility of two hearings on any claim—the hearing which resulted in the judgment, plus another to ascertain whether the judgment was in fact a liability for obtaining money or property by false pretense or false representations.

A determination of the proper extent of review which should be allowed where the above question is raised is important in the administration of the Federal Bankruptcy Act. The avowed purpose of a proceeding in bankruptcy is to give bankrupts "the new opportunity in life and the clear field for future effort, which it is the purpose of

the Bankruptcy Act to afford the emancipated debtor." *Local Loan Co.* v. *Hunter*, 292 U.S. 234, 245 (1934). It is also the obvious purpose of the act to grant a discharge of honest debts to honest debtors. *Williams* v. *U.S. Fidelity Co.*, 236 U.S. 549, 554, 555 (1915). It is important that this court determine which of the three various conclusions above is most in keeping with these purposes, and which is designed properly to weed the dishonest debtors from the honest.

The view selected must be designed to afford the bankrupt the constitutional right to due process of law (U.S. Const., Amend. XIV, Sec. 1, Appendix, p. A13) in the determination of whether he is, in fact, an honest or a dishonest debtor. This subsidiary question would seem to be fairly comprised within the arguments advanced heretofore by the Petitioners in their objections to the trial court examining the transcript of trial testimony to determine if they were honest debtors, when the trial reported in that transcript was a breach of contract suit, not embracing charges of false pretenses or false representations.

The age in which it was assumed that the debtor was necessarily to be dealt with as an offender passed with the adoption of the Constitution. See *Continental Illinois Nat. Bank and Trust Co.* v. *Rock Island Ry.*, 294 U.S. 648 (1935). Yet, the effect of a decision which decides the honesty or dishonesty of a debtor based on testimony at a hearing in which he was defending a contract action, and had not been charged with having incurred liability for false representations or false pretenses, would seem to be to give credence to some presumption of guilt.

No notice of the charged offense was given before the trial recorded in the transcript and notice is a basic requirement of the due process clause. *Armstrong* v. *Monzo*, (1965) 380 U.S. 545. We therefore urge that in its con-

sideration of the three views adopted by the various states in their inquiry into the dischargeability of a judgment under 11 U.S.C., Section 35 (a)(2), this Court give recognition to the implicit due process problem.

CONCLUSION

The conflict among the various state courts of final jurisdiction in determining a question involving the rights afforded by the federal bankruptcy laws, and the choice by the New Mexico court of a rule resulting in a denial of due process, make this matter one for the granting of a writ of certiorari.

Respectfully submitted,

JOHN E. MENIG, Esq.
Counsel for Petitioners
5200 Copper, N. E.
Albuquerque, N. M.

Of Counsel:

STANLEY C. SAGER, Esq.
EDWARD T. CURRAN, Esq.
5200 Copper, N. E.
Albuquerque, N. M.